Supreme Court, U.S.
FILED

952068 JUN 20 1996

OFFICE OF THE CLERK

No. 95-___

In The

Supreme Court of the United States

October Term, 1995

THOMAS WILLIAM SPERLING,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The Del Norte Municipal Court Of The State Of California

PETITION FOR WRIT OF CERTIORARI

CHARLES CRAIG KAYS
Bar #43462
Attorney at Law
12400 Highway 101 North
Suite 995
Smith River, California 95567
707-487-8400
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31 pp

ISSUES PRESENTED

1. Does California's seizure, confiscation, and suspension of the petitioner's motor vehicle driver's license by the arresting officer as directed by the California Department of Motor Vehicles, based upon the same facts as the subsequent criminal prosecution, constitute punishment thereby prohibiting a subsequent criminal prosecution in violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

2. Does California's statutory scheme, which empowers the Department of Motor Vehicles (executive branch of government) to adjudicate the drivers license suspension independently and prior to judicial criminal proceedings based upon the identical facts, violate the Doctrine of Separation of Powers within the protection of Due Process of Law under the Fifth and Fourteenth Amendments of the United States Constitution.

TABLE OF CONTENTS

Page

Issues Presented i

Table of Authorities iii

Petition for Writ of Certiorari to the Del Norte County Municipal Court for the State of California 1

Opinion Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved ... 2

Statement of Case 6

Statement of Facts 7

Reasons for Granting the Writ 8

Double Jeopardy 9

Separation of Powers 20

Conclusion 23

Appendix A – (Municipal Court Ruling) 1a

Appendix B – (Supreme Court denied) 3a

TABLE OF AUTHORITIES

Page

CASES:

Austin vs. United States, 509 U.S. ___ (1993) 13, 14, 15, 16, 18

Bell vs. Wolfish, 441 U.S. 520 (1979) 11

Berlinghari vs. Department of Motor Vehicles, 33 Cal.3d 392 (1992) 9

Dept. of Rev. of Montana vs. Kurth Ranch, 511 U.S. ___ (1994) 10, 11, 18, 19

Ex parte Lange, 18 Wall 163 (1871) 11

Gikas vs. Zolin, 6 Cal. 4th 841 (1993) 22

Kennedy vs. Mendoza-Martinez, 372 U.S. 144 (1963) 11

North Carolina vs. Pearce, 395 U.S. 711 (1969) 10

Parris vs. Zolin, 96 Daily Journal DAR 2459 (March 4, 1996) 22

Schuman vs. California, 584 F.2d 868 (1978) 10

Snelgrove vs. DMV, 194 Cal. App. 3d 1364 (1987) 22

Taylor vs. United States, 495 U.S. 575 (1990) 15

United States vs. $405,089.23 U.S. Currency, 33 F.3d 1210 (1993) 12

United States vs. Halper, 490 U.S. 435 (1989) 10, 12, 13, 14, 15

United States vs. McCaslin, 863 F.Supp. 1299 (1994) 17

United States vs. Sherbody, 865 F.2d 996 (9th Cir. 1988) 15

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

California Senate Bill 1623 17

United States Constitution, Fifth Amendment .. 1, 2, 19, 20

United States Constitution, Fourteenth Amendment 1, 2, 9, 19

California Vehicle Code §13353.2 ..... 2, 8

California Vehicle Code §§23152(a)&(b) ... 5, 6, 7, 17, 19

California Vehicle Code §23157(e) 21

California Evidence Code § 1280 21

California Evidence Code § 1453(b) 22

San Francisco Daily Journal, May 15, 1996, page 5 23

Petitioner, Thomas William Sperling, through counsel respectfully prays that a Writ of Certiorari issue to review the ruling of the Del Norte County Municipal Court, State of California entered on January 22, 1996 (Case Number 95-1137).

OPINION BELOW

The Order of the California Supreme Court denying review dated April 10, 1996 appears as Appendix "B". The Court of Appeal of the State of California, First Appellate District, No. A073468 summarily denied Petitioner's Writ of Prohibition on March 15, 1996. The Del Norte County Superior Court, No. 96-062, summarily denied Petitioner's Writ of Prohibition on February 14, 1996. The Del Norte County Municipal Court, No. 95-1137, denied Petitioner's Motion(s) to Dismiss on January 22, 1996 and wrote an Opinion (Appendix A)

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257 on the grounds that his rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution, section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Vehicle Code section 13353.2, subdivisions (a) through (f) provide:

> **§13353.2 Immediate Suspension of Driver's License – Blood Alcohol Level of 0.08 Percent**

in Persons 21 or Older, Blood Alcohol Level of 0.01 in Persons Under 21.

(a) The department shall immediately suspend the privilege of any person to operate a motor vehicle if the person was driving a motor vehicle when the person **was 21 years of age or older and** had 0.08 percent or more, by weight, of alcohol in his or her blood, **or when the person was under 21 years of age and had a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test.**

(b) The notice of the order of suspension under this section shall be served on the person by a peace officer pursuant to Section **23137 or** 23158.5. The notice of the order of suspension shall be on a form provided by the department. If the notice of the order of suspension has not been served upon the person by the peace officer pursuant to Section **23137 or** 23158.5, upon the receipt of the report of a peace officer submitted pursuant to Section 23158.2, the department shall mail written notice of the order of the suspension to the person at the last known address shown on the department's records and, if the address of the person provided by the peace officer's report differs from the address of record, to that address.

(c) The notice of the order of suspension shall clearly specify the reason and statutory grounds for the suspension, the effective date of the suspension, the right of the person to request an administrative hearing, the procedure for requesting an administrative hearing, and the date by which a request for an administrative hearing shall be made in order to receive

a determination prior to the effective date of the suspension.

(d) The department shall make a determination of the facts in subdivision (a) on the basis of the report of a peace officer submitted pursuant to Section 23158.2. The determination of the facts, after administrative review pursuant to Section 13557, by the department is final, unless an administrative hearing is held pursuant to Section 13558 and any judicial review of the administrative determination after the hearing pursuant to Section 13559 is final.

(e) The determination of the facts in subdivision (a) is a civil matter which is independent of the determination of the person's guilt or innocence, shall have no collateral estoppel effect on a subsequent criminal prosecution, and shall not preclude the litigation of the same or similar facts in the criminal proceeding. If a person is acquitted of criminal charges relating to a determination of facts under subdivision (a), **or if the person's driver's license was suspended pursuant to Section 23137 and the department finds no basis for a suspension pursuant to that section,** the department shall immediately reinstate the person's privilege to operate a motor vehicle if the department has suspended it administratively pursuant to subdivision (a), and the department shall return or reissue for the remaining term any driver's license which has been taken from the person pursuant to Section 23158.5 or otherwise. **Notwithstanding subdivision (b) of Section 13558, if criminal charges under Section 23152 or 23153 are not filed by the district attorney because of a lack of evidence, or if those**

charges are filed but are subsequently dismissed by the court because of an insufficiency of evidence, the person has a renewed right to request an administrative hearing before the department. The request for a hearing shall be made within one year from the date of arrest.

(f) The department shall furnish a form that requires a detailed explanation specifying which evidence was defective or lacking and detailing why that evidence was defective or lacking. The form shall be made available to the person to provide to the district attorney. The department shall hold an administrative hearing, and the hearing officer shall consider the reasons for the failure to prosecute given by the district attorney on the form provided by the department.

California Vehicle Code section 23152, subdivision (a) and (b):

§23152. [Operative Upon Condition Set Forth in Subsection (d) Being Met] Driving While Under the Influence of Alcohol or Drugs.

(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol

per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari after the Supreme Court of California denied Petitioner's Application for Stay and Petition for Review on April 10, 1996 (Appendix "B").

On June 15, 1995 the Del Norte District Attorney's Office filed a complaint in case no. CRTR 95-1137 alleging that petitioner, Thomas William Sperling, violated sections 23152(a) and 23152(b) of the Vehicle Code by willfully driving a motor vehicle under the influence of an alcoholic beverage (subdivision (a)) and unlawfully driving while having more than .08 percent and more, by weight of alcohol in his blood.

Petitioner filed a motion to dismiss based upon violation of Double Jeopardy and hearing was set for September 18, 1995 and ruling subsequently set for January 5, 1996. Petitioner's Supplement #1 and #2 to Motion to Dismiss adding Separation of Power as an additional Constitutional violation on October 12, 1995. The Del Norte County Municipal Court, Judge Phillip Schafer

ruled on January 22, 1996 (Appendix "A"). The trial date(s) have been vacated by the Del Norte Municipal Court and the District Attorney to allow the Petitioner's attorney to seek review of the important constitutional issues. Review was sought in the Del Norte County Superior Court (Petition for Writ of Prohibition denied February 14, 1996, California District Court of Appeal denied March 15, 1996, California Supreme Court denied April 10, 1996). Jury trial setting is on June 24, 1996 and Petitioner will request a continuance to await a decision on this Petition for Writ of Certiorari.

STATEMENT OF FACTS

On May 11, 1995 the defendant Thomas Sperling was arrested in violation of California Vehicle Code § 23152(a) (Driving Under the Influence of Alcohol). A subsequent blood test indicated a blood-alcohol concentration of .16%; he was later charged with a violation of California Vehicle Code § 23152(b) (Driving With Over .08% Blood Alcohol Concentration). He was arraigned on both counts on June 23, 1995 and entered a plea of not guilty.

At the same date and time (May 11, 1995) Officer O'Brien of the California Highway Patrol initiated parallel proceedings as directed by the California Vehicle Code and the California Department of Motor Vehicles. The arresting officer seized the Defendant's driver license and served the defendant with an "Administrative Per Se Order of Suspension/Revocation" which included a "Temporary License Endorsement". The Seizure and mandated confiscation pursuant to Vehicle Code

§ 13353.2 revoked the Defendant's license for 120 days subject to a 30 day period in which Mr. Sperling could appeal the suspension by requesting an administrative hearing.

The administrative hearing consists of a Department of Motor Vehicles officer with no legal training who conducts a hearing and acts both as prosecutor and judge. The evidence is entirely hearsay including the results of the blood test. Mr. Sperling's driver license was suspended June 10, 1995 for four months.

Mr. Sperling represents that he was *entitled* to obtain his California Driver License and did so when he was sixteen years old (12/10/55) and he has been entitled to drive a motor vehicle until the license seizure and revocation. The deprivation of his driver license has caused an estimated financial punishment of $20,000 to maintain his business travel obligations.

REASONS FOR GRANTING THE WRIT

Review should be granted to determine whether California and other States, which have adopted substantially the same statutory scheme, has violated the fundamental protections afforded the Petitioner by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and the Doctrine of Separation of Powers under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

DOUBLE JEOPARDY

A driver license has been labeled a "privilege" by the California Legislature in the past. Clearly, that label is no longer appropriate. Todays highly mobile and technological society has mandated that the driver license is an "entitlement right" or "liberty interest" and not a privilege that is granted to a few specially educated or work experienced business/professionals, i.e., contractors, real estate brokers, nurses, CPA, etc. All citizens of minimum age with limited or no education can pass a basic questionnaire and display basic driving skills. Every resident is encouraged to acquire a driver license for identification, basic credit applications, as a condition of employment or a necessary tool to commute to work.

The continued possession of one's driver license is a vested, fundamental right that is protected by the U.S. Constitution through the Fourteenth Amendment. "In determining whether the right (to drive) is fundamental the court (does) not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation . . . "

"We conclude that the decision to suspend a driver's license has a substantial effect on a right which, for the purpose of judicial review of an administrative decision, can only be considered as fundamental. As explained in *Bixby* the basic consideration in determining whether a right is "fundamental" focuses upon the importance of the affected right to the individual who stands in jeopardy of losing it." *Berlinghari v. DMV,* 33 C.3d 392 (1982). "We find such a federal right by adopting the analysis of the First Circuit which held that the use of a motor

vehicle is a "liberty" interest protected by due process." (citations) *Schuman v. California*, 584 F.2d 868 (1978).

Prior to *U.S. v. Halper*, 490 U.S. 435 (1989), civil sanctions did not generally constitute punishment. However, the *Halper* decision held that a legislature's labels of " . . . 'criminal' and 'civil' are not paramount in determining whether a sanction constitutes punishment for double jeopardy purposes." . . . The new test: . . . "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained as also serving either retributive or deterrent purposes, is punishment." *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937, 128 L.Ed.2d 767, 777. Kurth reaffirmed *Halper*. (discussed infra.)

Halper involved a civil penalty for filing a false claim with the government after a criminal conviction for the same act. The Court reviewed the history of the Double Jeopardy Clause with specific emphasis as to the prohibition against multiple punishments for the same offense:

> This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution after acquittal; a second prosecution for the same offense after conviction; and multiple punishment for the same offense. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969). The third of these protections – the one at issue here – has deep roots in our history and jurisprudence. As early as 1641, the Colony of Massachusetts in its "Body of Liberties" stated: "No man shall be twice sentenced by Civil Justice for one and the same Crime,

offense, or Trespasse." American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910). In drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." 1 Annals of Cong. 434 (1789-1791) (J. Gales ed. 1834). In our case law, too, this Court, over a century ago, observed: "If there is anything settled in the Jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange*, 18 Wall 163, 168, 21 L.Ed. 872 (1874) and deterrence. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168, 9 L.Ed.2d 644, 83 S.Ct. 554 (1963) (these are the "traditional aims of punishment"). Furthermore, "retribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell v. Wolfish*, 441 U.S. 520, 539, n. 20, 60 L.Ed.2d 447, 99 S.Ct. 1861 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. Cf. *Mendoza-Martinez*, 372 U.S. at 169, 9 L.Ed.2d 644, 83 S.Ct. 554 (whether sanction appears excessive in relation to its nonpunitive purpose is relevant to determination whether sanction is civil or criminal). 490 U.S. 435, 446-449, 104 L.Ed.2d 487, 500-502.

In *Montana Department of Revenue v. Kurth Ranch*, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), the Supreme Court reaffirmed *Halper* and applied the Double Jeopardy

Clause analysis of punishment to a tax. The Court held that it violated double jeopardy for a defendant to be tried criminally for selling marijuana and then to be charged for failure to pay the tax. The fact that one proceeding was civil and one was criminal did not matter, as long as they both involved the same offense and both were intended as punishment.

"This drug tax is not the kind of remedial sanction that may follow the first punishment of a criminal offense. It is a second punishment within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence,' *Halper,* 490 U.S. at 440, and therefore must be imposed during the first prosecution or not at all. The proceedings Montana initiated . . . was the *functional equivalent* of a successive criminal prosecution that placed the Kurths in jeopardy a second time "for the same offense." (emphasis added) 128 L.Ed.2d 767, 782.

The parallel criminal prosecution and civil license forfeiture/suspension of the defendant in the instant case has remarkable analytical similarities to the recent 9th Circuit Court of Appeals case of *U.S. v. $405,089.23 U.S. Currency.* (33 F.2d 1210) (1994). That case involved a forfeiture of property proceeding and a criminal prosecution based upon the same violation of law. The Court raised two issues: (1) Whether the civil forfeiture action and claimant's criminal prosecution constituted separate "proceedings" and (2) whether the civil forfeiture constituted "punishment".

As to issue #1 regarding separate "proceedings" the Court reflected:

> We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different fact finders, presided over by different district judges, and resolved by separate judgments, constitute the same "proceeding". In ordinary legal parlance, such actions are often characterized as "parallel proceedings", but not as the "same Proceeding". A forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time. (page 1216)
>
> . . . .
>
> We conclude, therefore, that whether or not two actions are brought as part of a "single, coordinated prosecution" is irrelevant for purposes of the Double Jeopardy Clause: a civil forfeiture action which is brought and tried separately from a criminal prosecution and is based upon the same offense constitutes a separate "proceeding" (page 1218)

As to issue #2 "punishment" for double jeopardy purposes the court explained:

> As the government notes, the specific holding in *Austin* was that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture actions. However, in determining whether the Excessive Fines Clause applied, the Court found it necessary to determine, as we are required to determine here, whether the forfeiture statutes at issue constituted "punishment". It employed the *Halper* test -- the same test it had used to decide whether a civil monetary penalty constituted "punishment" for purposes of the Double

Jeopardy Clause – in making that determination. We believe that the only fair reading of the Court's decision in *Austin* is that it resolves the "punishment" issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause. In short, if a forfeiture constitutes punishment under the *Halper* criteria, it constitutes "punishment" for purposes of *both* clauses. *See Smith, supra,* ¶ 12.10[2], at 12-131 ("The Supreme Court's decision in *Austin v. United States* makes it clear that *Halper's* double jeopardy protections do apply to the vast majority of civil forfeiture cases".) (footnote omitted). In light of the decision in *Austin,* and applying the *Halper* test here, we find the conclusion inescapable that civil forfeiture under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) constitutes "punishment" which triggers the protections of the Double Jeopardy Clause.

. . .

Under *Austin,* in order to determine whether a forfeiture constitutes "punishment", we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit. The government appears to assume that we must determine in each case whether the particular forfeiture is so excessive in relation to any remedial goal that it must be denominated as "punishment". However, the *Austin* Court explicitly refused to apply such a case-by-case approach to determining whether a forfeiture constitutes "punishment". See *Austin,* ___ U.S. at ___ n.14 113 S.Ct. at 2812 n.14. Rather, largely because

"forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence," *id.*, the Court held that any determination of whether those forfeitures constitute "punishment" must look to the requirements of the forfeiture *statute* as a whole. *See, Smith, supra,* ¶ 12.10 at 12-13 ("the *Austin* Court thought that in the forfeiture context it made sense to focus on the forfeiture statute as a whole."). In so doing, the Court adopted a categorical approach to "punishment" determinations in the forfeiture context, much like the categorical approach it has adopted for determining whether a particular statute defines a "violent felony" for purposes of the Firearms Owners' Protection Act. *See, Taylor v. United States,* 495 U.S. 575, 600-02, 110 S.Ct. 2143, 2159-60, 109 L.Ed.2d 607 (1990); *see also, United States v. Sherbondy,* 865 F.2d 996, 1005-1010 (9th Cir. 1988). To determine whether the forfeiture the government seeks to impose in these proceedings constitutes "punishment", we must focus on the characteristics of the forfeiture statutes on which it relies.

While the government appears to rely principally on its argument that the res consists entirely of illegal proceeds, we will also construe its argument, generously, as contending that the forfeiture *statutes* involved are limited to the forfeiture of illegal proceeds, and that they therefore do not impose "punishment." This argument not only misconceives the legal standard established in *Austin* but also misstates the scope of the statutes involved. In determining that forfeitures under §§ 881(a)(4) & (a)(7) constitutes "punishment" under the *Halper* test,

the *Austin* Court relied on the three facts. First, the Court noted that "the historical understanding of forfeiture as punishment" weighed heavily in favor of the conclusion that forfeiture continues to serve punitive purposes. *Austin*, ___ U.S. ___, 113 S.Ct. at 2812. Second, the Court discerned a punitive purpose from "the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner". *Id.* According to *Austin* Court, this focus was evident from the fact that the statutes "expressly provide an 'innocent owner' defense," and thus authorize forfeiture only where the owner is himself involved in illegal activity. *Id.* ___ U.S. at ___, 113 S.Ct. at 2810. Finally, the Court in *Austin* relied on "evidence that Congress understood those provisions as serving to deter and punish" to support its conclusion that the §§ 881(a)(4) & (a)(7) did not serve *solely* remedial purposes. *Id.* ___ U.S. at ___, 113 S.Ct. at 2812. In substantial part, this evidence consisted of the fact that "Congress has chosen to tie forfeiture directly to the commission of drug offenses." *Id.* ___ U.S. ___ at ___, 113 S.Ct. at 2811.

Austin thus makes clear that at least three principles are relevant to determining whether a forfeiture constitutes "punishment". First, because of "the historical understanding of forfeiture as punishment," *id.* ___ U.S. at ___. 113 S.Ct. at 2812, there is a strong presumption that any forfeiture statute does not serve *solely* a remedial purpose. Second, where such a statute focuses on the culpability of the property owner by exempting innocent owners or lienholders, it is likely that the enactment serves at least in part to deter and punish guilty conduct. Finally, where Congress has tied forfeiture directly to

> the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to or punishment for those violations of law. 33 F.3d 1210, 1219-1221.

There is a very clear parallel between the civil forfeiture of property in the discussed federal case and the civil "forfeiture" of a driver's license in the case herein. In both cases, the government is attempting to punish the individual in the two different proceedings for the exact same conduct, i.e., for driving with a .08% blood alcohol; the only evidence offered at D.M.V. suspension hearings consists of the identical police reports relied upon by the prosecution in filing and prosecuting the criminal charges. California Vehicle Code § 13352 (Note), Statutes 1990, Chapter 1403, § 1(b), addresses license suspensions for drunken driving as a deterrent and provides that "one method to deal with the problem of drinking drivers is to discourage the use of motor vehicles by persons who have consumed alcoholic beverages." A comment in the report on a subsequently enacted Driving Under the Influence bill (SB 1623) from the Senate Committee on the Judiciary said, "Administrative per se is the prompt administrative suspension or revocation of the driving privilege for alcohol-related offenses independent of court action. Mothers Against Drunk Driving, the sponsors of this bill, suggests that this bill is necessary in order to establish 'swift, sure and effective' penalties for DUI offenses."

The Ninth Circuit Court's reasoning has been reflected most recently in *U.S. v. McCaslin*, 863 F.Supp. 1299 (W.D. Wash. 1994). In that case, a federal district

court judge held that a drug dealer who had been forced to forfeit his proceeds in civil proceedings could not thereafter be tried criminally for the same conduct triggering the forfeiture.

Clearly, California's statutory scheme for proceeding against individuals accused of driving with .08% blood alcohol content in parallel civil and criminal proceedings constitute punishment. Just as clearly, imposing one of these punishments after already meting out the other violates the Double Jeopardy Clause.

Applying the *Austin* three-prong "punishment" test to California's parallel civil confiscation/suspension and criminal prosecution proceedings in "drunk driving" cases:

1. There is a "strong presumption" that the suspension at least partially serves punitive and/or deterrent purposes;

2. Since the suspension proceeding focuses on the culpability of the licensee, "it is likely that the enactment serves at least in part to deter and punish guilty conduct."

3. The California legislature has tied confiscation/suspension directly to the commission of the DUI offense, therefore it is "at least partially intended as an additional deterrent to or punishment for" the violation of law.

It is clear that the very same analysis applies to California's parallel suspension and criminal proceedings.

Similarly, the Supreme Court in *Kurth Ranch* identified six different features of Montana's marijuana tax

which compelled the conclusion that the tax constituted punishment. A comparison shows that California's "administrative per se" license seizure and suspension fits *Kurth Ranch* perfectly:

1. The tax had a deterrent or punitive purpose and was not solely remedial.

2. The tax was conditioned on the commission of a crime.

3. The tax was exacted after a person was arrested for the precise conduct that gave rise to the tax obligation in the first place.

4. Persons arrested for possession of marijuana constituted the entire class of those persons subject to the tax.

5. The tax was imposed by the same sovereign which enacted the criminal sanction.

6. The tax was not imposed in the same proceedings as the criminal sanction.

In the case presented by petitioner, the DMV administrative proceedings were adjudicated before the criminal matters herein, which are still pending trial. A determination was made that suspension of petitioner's driving license should be imposed. The administrative proceedings triggered due process considerations made applicable to the state through the United States Constitution, Fourteenth Amendment and, thereby, also triggered Fifth Amendment protections. While the imposition of the suspension may have been called remedial in nature, the suspension was primarily intended as punishment for the Vehicle Code section 23152(a)&(b) violations and must fall under the aegis of the United

States Constitution, Fifth Amendment protection against double jeopardy.

SEPARATION OF POWERS

The California statutory scheme for adjudicating the driver's license suspension by an administrative agency has the "back door effect" of infringing on its judicial branch function by taking Petitioner's "liberty interest" or entitlement right by administrative action in lieu of judicial proceedings.

Lawrence Taylor, author of "California Drunk Driving Defense", has summarized the reality of the California scheme

> When a driving-under-the-influence suspect is arrested and booked, his driver's license is immediately confiscated by the arresting officer, and he is served with a notice of suspension. This occurs whether the suspect takes a breath test with a reading of 0.08 percent or higher, gives a blood or urine sample for later analysis or simply refuses to take a test. Although the suspect is supposed to be given a choice from among the three tests, in practice this legal requirement is commonly ignored.
>
> Blood- or urine-test results are typically not available from the crime laboratory for two or three weeks. Although the results may well indicate a blood-alcohol level below 0.08 percent, a DUI suspect's license is still seized and his driving privileges suspended. Thus, a suspect's blood-alcohol level is often presumed to

be over 0.08 percent without any available evidence. See California Vehicle Code Section 23157(e).

Lost in two pages of fine print in the notice of suspension is notification that the individual can request an administrative hearing within 30 days to contest the suspension. Suspects who attempt to request a hearing may face frustrating red tape: It often takes two or three phone calls to locate the correct office; callers may be placed on hold for significant lengths of time; clerks may not have immediate access to records; it can take as long as three weeks for the police to forward the forms to the Department of Motor Vehicles; and the earliest available hearing date can be up to two months away. In all, a suspect can serve almost one-half of the 120-day suspension before he even has a hearing. (An earlier hearing can be granted if the individual agrees to one conducted by telephone.)

Assuming that the citizen insists on an in-person hearing, when he reports to the driver-safety office he will find that there is only one other person in the hearing room: the hearing officer is a good chance the officer has had no legal training, this individual is both prosecutor and judge. He will rule on his own objections and, after the case is concluded, decide whether the state or the suspect has "won."

The hearing officer will introduce the arresting officer's police report and the results of the chemical test – all hearsay – into evidence. They are deemed to be within the public records exception to the hearsay rule, Evidence Code Section 1280, and are further presumed to be

authentic. Evidence Code Section 1453(b). See also *Snelgrove v. DMV*, 194 Cal.App.3d 1364, 1375 (1987). Furthermore, the official-duty presumption, Evidence Code Section 664, cloaks the police report and breath-machine printout (or laboratory report of blood or urine analysis) with presumptive accuracy – without any foundation (and without any witness to rebut that presumption). After overruling any objections to the documents, the hearing officer will then rest his case.

If the citizen asks to cross-examine the officer or the crime-lab analyst, he may be informed that they are unnecessary. Had he wished to confront his accusers, the hearing officer will tell him, he should have served a DMV subpoena on the official himself, along with a $150 check for witness fees (he would be billed later for the balance of the official's salary, usually overtime). If the officer or analyst ignores the administrative subpoena, the DMV could refuse to enforce it. The California Supreme Court recently held, however, that the DMV must certify the file to the Superior Court for contempt proceedings if the officer or analyst refuses to comply. *Parris v. Zolin*, 96 Daily Journal D.A.R. 2459 (March 4, 1996).

If the accused points out to the hearing officer that the criminal trial court has already granted a motion to suppress the results of the breath test because of violations of his constitutional rights, the hearing officer will advise him that such rulings have no effect on the DMV. See *Gikas v. Zolin*, 6 Cal.4th 841 (1993).

Perhaps two or three weeks later, the citizen will receive a form letter from the hearing officer, usually informing him that he has lost (i.e., the hearing officer's prosecution was successful). The form letter gives no specific findings or reasons for the decision.

Attorneys in other states are often astounded by California's DUI procedures. In Texas, for example, hearing officers are qualified administrative law judges, there is an independent prosecutor from the attorney general's office and the arresting officer is a necessary witness whose non-appearance will result in the suspension immediately being set aside. In at least 34 states, the suspect is not required to pay the officer to testify.

San Francisco Daily Journal,
California's DUI Hearing System
May 15, 1966, page 5.

CONCLUSION

Petitioner prays that this Court will grant his petition for certiorari in order to determine the very important questions of law and resolve the split of opinions that have arisen in state and federal courts.

Dated June 19, 1996

Respectfully submitted,

CHARLES CRAIG KAYS
Attorney for Petitioner
Thomas William Sperling

MUNICIPAL COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF DEL NORTE

PEOPLE OF THE STATE OF CALIFORNIA, vs. THOMAS WILLIAM SPERLING, CRTR 95-1137, SOM BOON HAKCHALEUN, CRTR 95-1372, GLEN WILLIAM BARTLEY, CRTR 95-1409, JOSEPH EVANS, CRTR 95-1202, WINDRED HARTWICK, CRTR 95-1746, ROGER BUCKSKIN, CRTR 95-1721, Defendants,	RULING ON MOTION (CONSOLIDATED FOR PURPOSE OF RULING) CASES CALENDARED FOR: DATED: Feb. 16, 1996 TIME: 1:30 p.m.

These cases challenge the State's ability to both apply the administrative suspension of driving rights (***Vehicle Code 13353.2***) and to criminally prosecute for the same conduct (***V.C. 23152(b)***). Cases within the Federal system and other states are cited to support the conclusion that to pursue both processes is to subject a defendant to double jeopardy. The debate becomes whether the administrative action is remedial or punitive or perhaps mixed. Each side can find comfort in case law and statements of supporters of the legislation. To determine legislative purpose we begin and end with the stated purpose:

> "To provide safety for all persons using the highways of this state by quickly suspending the driving privilege of those persons who have

> shown themselves to be safety hazards by driving with an excessive concentration of alcohol in their bodies."

We decline to define the intent of a legislative group by the political hyperbole of individuals.

The conclusion is that the administrative suspension is remedial. The purpose is to protect the safety of highway users. The ***HALPER/AUSTIN and KURTH RANCH*** cases all dealt with dollars or tangible assets that could be valued, but a driver's license is not a commodity. We therefore can not measure its loss and analyze these cases in the same manner.

The Motions to Dismiss are denied. Each case is placed on calendar for further proceedings February 16, 1996 at 1:30 P.M..

DATED: January 22, 1996

/s/ Philip Schafer
PHILIP SCHAFER,
Judge of the Municipal Court

No. 1/2 A073486 – S052503

IN THE SUPREME COURT OF CALIFORNIA

THOMAS WILLIAM SPERLING, Petitioner

v.

DEL NORTE COUNTY SUPERIOR COURT, Respondent
PEOPLE, Real Party in Interest

(Filed Apr. 10, 1996)

Application for stay and petition for review DENIED.

LUCAS
Chief Justice